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No. 85-875

In The
Supreme Court of the United States
October Term, 1985

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

LUIGI MANOCCHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

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QUESTION PRESENTED

WHETHER THE JUDGMENT OF THE RHODE ISLAND SUPREME COURT SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *Delaware v. van Arsdall* No. 84-1279, slip op. (April 7, 1986)?

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Now comes the State of Rhode Island and Providence Plantations, Petitioner herein, by its attorney, and files the within supplemental brief for the purpose of addressing a recent decision of this Honorable Court. This supplemental brief is filed pursuant to Rule 22.6.

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PROCEDURAL BACKGROUND

The instant Petition for Certiorari was docketed on November 15, 1986. The Petition addressed to this Court's attention the following question:

QUESTION PRESENTED FOR REVIEW

> Whether the Rhode Island Supreme Court erred in holding that limitation of cross-examination regarding one aspect of the memory and perception of the prosecution's chief witness constituted *per se* reversible error pursuant to this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974)?

Pet. for Cert. i. In discussing the merits of this issue, Petitioner suggested that the instant case raised precisely the same issue that would be before the court in *Delaware v. van Arsdall*, No. 84-1279 (U.S. cert. granted July 2, 1985). Thereafter, on December 18, 1985, the Petitioner filed a motion to defer disposition of the instant Petition until such time as this Court rendered a decision in the *van Arsdall* case. The *van Arsdall* case was decided on April 7, 1986, and the instant Petition is therefore ripe

for disposition. The within supplemental brief discusses the instant case in light of *van Arsdall.*

WHETHER THE JUDGMENT OF THE RHODE ISLAND SUPREME COURT SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN Delaware v. van Arsdall No. 84-1279, slip op. (April 7, 1986)?

The instant case involves the question whether the trial justice properly limited the defendant's cross-examination of the prosecution's chief witness. In reversing defendant's conviction, the Rhode Island Supreme Court reasoned that this Court's decision in *Davis v. Alaska,* 415 U.S. 308 (1974), imposed a rule of automatic reversal when a trial judge limits the ability of the defendant to cross-examine a prosecution witness. The Rhode Island court described the scope of its *per se* error rule as follows:

> [W]e clearly established a per se error rule where the defendant has been fully precluded from effective cross-examination on a pertinent issue. We have also relied on the per se standard where a defendant has been permitted to ask preliminary questions but has been otherwise functionally precluded from constitutionally adequate cross-examination.

Pet. app. 7 (citations omitted).

The Rhode Island Supreme Court based its per se reversal rule upon this Court's decision in *Davis, supra.* In seeking certiorari, Petitioner herein disputed the validity of the *per se* rule and suggested that the Rhode Island Supreme Court was misreading this Court's decision in *Davis:*

> The Petitioner submits that the *per se* error doctrine constitutes an erroneous extension of this Court's decision in *Davis*. Confrontation and cross-examination are important rights. Nevertheless, Petitioner submits that even in situations where a trial judge has imposed limitations upon cross-examination a proper interpretation of the Sixth Amendment requires analysis of the totality of the circumstances to determine whether the defendant received a constitutionally fair trial.

Pet. for Cert. 7-8. The decision of this Court in *van Arsdall* clarifies the rule of *Davis* and reveals that the Rhode Island Supreme Court erred when it applied a per se reversal rule in the instant case.

First, this court in *van Arsdall* noted that, the Confrontation Clause notwithstanding, a trial judge retains significant discretion in defining the scope of cross-examination:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. — (1985) (per curiam).

Delaware v. van Arsdall, slip op. In the instant case the State's chief witness testified prior to trial that he was

suffering from premature Alzheimer's disease. Defense counsel at trial attempted to bring this matter before the jury by cross-examining the witness with regard to the Alzheimer diagnosis. Defendant claimed on appeal that foreclosing this avenue of cross-examination effectively precluded the defense from revealing to the jury the alleged impact of Alzheimer's disease upon the memory of the individual who is suffering from the disease. The State contended that the limitation of cross-examination was harmless for two reasons. First, a review of the trial transcript revealed that the witness openly displayed his memory lapse to the jury. He responded to literally dozens of questions by stating that he had no memory or that his recollection was faulty. Thus, it was readily apparent to the jury—and to anyone else who examined the trial transcript in its totality—that the witness was suffering from a memory problem. The defendant was, in essence, merely attempting to establish Alzheimer's disease as the causal basis for the memory lapse. Because the substantive memory problem was manifest, the nature of the memory problem was, in the words of the *van Arsdall* Court, only "marginally relevant."

Moreover, under Rhode Island law, this witness would certainly not have been qualified to testify in any detail with regard to the nature and effect of Alzheimer's disease. Under ordinary evidentiary principles it would have been erroneous to permit this lay witness to testify about the nature and cause of a disease. *E.g., State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). At most he could have recounted the fact that he was suffering from some memory losses. Yet this information was clearly before the jury in the form of

numerous failures of recollection in response to specific questions.

Because the witness' memory loss was obvious to the jury, there was scant possibility of prejudice as a result of the limitation of cross-examination. The Petitioner submits that it was incumbent upon the Rhode Island Supreme Court to undertake a harmlessness analysis. The court should have focussed upon the testimony of the witness in its entirety. The excluded evidence should then have been examined to determine whether its omission resulted in prejudice to the defendant. If the material excluded was marginal or merely cumulative, reversal of defendant's conviction is inappropriate:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. van Arsdall, slip op.

In the instant case the Rhode Island Supreme Court declined to undertake such an inquiry, choosing instead to apply the *per se* rule of reversal. This Court in *van Arsdall* clearly found error in the application of a *per se* reversal rule. Under the law as enunciated in *van Arsdall*,

the Rhode Island Supreme Court has erred and its decision must be reversed.

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CONCLUSION

For the foregoing reasons, and for such additional reasons as appear in the Petition for Certiorari and in the Petitioner's previous Supplemental Brief, the judgment of the Rhode Island Supreme Court should be vacated and the case remanded for reconsideration in light of *Delaware v. van Arsdall,* No. 84-1279, slip op. (Apr. 7, 1986).

Respectfully submitted,

STATE OF RHODE ISLAND
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